



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 9

ETHICS AND PROFESSIONAL PRACTICE

***This is the*** summative (formal) assessment ***for*** Module 9 ***of this course and is compulsory for all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 9. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

### INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment9]. An example would be something along the following lines: 202223-336.assessment9. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentnumber" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 8 pages.**



**ANSWER ALL THE QUESTIONS**

Commented [LJ1]: TOTAL: 38 out of 50

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [LJ2]: 7/10

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

**Please choose the most correct answer from the options below.**

**INSOL International's *Ethical Principles for Insolvency Professionals* -**

- (a) are mandatory and apply to all its members.**
- (b) creates a set of rules which all jurisdictions have to incorporate into their insolvency frameworks.**
- (c) creates a set of rules by which stakeholders and the public in most jurisdictions would be able to determine whether insolvency practitioners are acting in accordance with ethical principles.**
- (d) creates a set of best practice principles to inform and educate insolvency practitioners and stakeholders by providing ethical and professional guidance on issues of importance.**

Question 1.2

**The "Enlightened Creditor Value" approach to insolvency proposes the following with regard to the protection of competing interests in insolvency proceedings:**

- (a) Creditors' interests are of paramount importance and as such only these interests should be protected in insolvency.**
- (b) The interests of stakeholders should be regarded in the same manner as those of creditors.**
- (c) Creditors' interests are of paramount importance, however, the interests of other stakeholders should also be considered where this would be in the creditors' interests.**

**(d) Only the shareholders of the company and the creditors of the company should be protected by the insolvency law (and in that order).**

Question 1.3

**Unethical behaviour by insolvency practitioners can undermine the entire insolvency framework of a country due to a lack of trust and confidence in the insolvency profession.**

**(a) True**

**(b) False**

Question 1.4

**Being an officer of the court requires a person to act with integrity and to not mislead the court in acting on behalf of a client. An officer of the court recognises the importance of dishonesty in the justice system and as such would act in a manner which would further the administration of justice to the best of their ability.**

**(a) True**

**(b) False**

Commented [LJ3]: b

Question 1.5

Select the correct answer:

**Ho has been appointed as a liquidator of Company X. Company X has several major creditors, including ABC Bank. A year prior to the liquidation of the Company, Ho was acting in an advisory capacity for ABC Bank in litigation against Company X where he attempted to advance ABC's position as a creditor.**

**This situation is an example of a / an \_\_\_\_\_ threat.**

**(a) self-review**

**(b) self-interest**

**(c) advocacy**

**(d) intimidation**

Question 1.6

*John was appointed as the liquidator of DebtCO. One of DebtCO's suppliers and major unsecured creditors, S. Panesar, is very friendly towards John. Mr Panesar has heard in passing that John enjoys sport and managed to procure tickets to several events in the recent Tokyo 2020 Olympic Games, which John accepted. John realises that this will be deemed questionable behaviour and he fears that Mr Panesar will make the offer and acceptance of the gift public. This would certainly create a threat to his perceived objectivity.*

*This situation is an example of a / an \_\_\_\_\_ threat.*

- (a) familiarity*
- (b) self-review*
- (c) advocacy*
- (d) intimidation***

Question 1.7

*Select the correct answer:*

*Thembi is a well-known insolvency practitioner and is often sought out for her knowledge and expertise. She currently has ten ongoing insolvency matters (most of them quite complex) and has been feeling somewhat overwhelmed. Due to her impressive *curriculum vitae* she is contacted by a very large designer company in distress inquiring whether she would be able to take an appointment as an administrator. Thembi should:*

- (a) Accept the appointment as it will boost her career even further.*
- (b) Accept the appointment as she can get one of her junior associates to take over all her other cases.*
- (c) Accept the appointment because as a professional she will have the ability to give all of the cases she is involved in some attention, although some of them will now only be overseen by her.*
- (d) Refuse the appointment as she will not be able to give all of the cases she is involved in the requisite level of attention.***

Question 1.8

Select the correct answer:

**Rajesh has been appointed as a new associate at the firm where he is employed. In his new role he has to meet certain targets in relation to the fees he earns for taking appointments. Rajesh is currently appointed as a liquidator for a small company. He realises that he will not meet the firm's target for fees. The most ethical thing for Rajesh to do would be to:**

- (a) Call a creditors' meeting requesting an adjustment to his agreed fees due to unforeseen circumstances.
- (b) Ask his administrative assistant to invoice the estate for the use of the firm's conference venue for meetings held there at a 50% increased fee.**
- (c) Carry out his duties in a timely fashion and complete the appointment efficiently and without undue delay, only invoicing for work properly performed.
- (d) Ask his administrative assistant to double check all the calculations in the case file and then bill the hours as part of his invoice.

Commented [LJ4]: c

Question 1.9

Select the most correct answer from the options below.

**An insolvency practitioner using a fixed fee calculation method for determining the amount of remuneration owed to him, will receive a fair amount of remuneration.**

Please choose the most correct answer.

- (a) This statement is false since the practitioner might have carried out more work and invested more resources than is reflected in the fee.
- (b) This statement is true since jurisdictions always allows for an adjustment of fees where it is necessary.**
- (c) This statement is false since the practitioner will always receive more remuneration than what is reflected in the work carried out.
- (d) This statement is false since the only way to receive a fair amount of remuneration is to calculate the remuneration on an hourly rate.

Commented [LJ5]: a

Question 1.10

Select the most correct answer from the options below.

**Timothy has been appointed as the judicial manager of a large public company. As a result of his appointment, he has been privy to confidential information regarding the company and its stakeholders. Timothy is aware that there is a duty on him to maintain confidential information and is very careful when he speaks to the press and members of the public. However, he often discloses work related information including sensitive information to his brother-in-law when they see one another over weekends and Timothy believes the information will be kept confidential by him.**

**Please select the statement that best describes Timothy's situation.**

**(a) Timothy is not in breach of his duty to confidentiality. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as he trusts him to keep the information to himself.**

**(b) Timothy is in breach of his duty to act in the best interests of the beneficiaries of his duties. Timothy's disclosure of confidential information to his brother-in-law will pose a conflict of interest and create bias in the exercise of his duties.**

**(c) Timothy is in breach of his duty to confidentiality. As an IP he should maintain confidentiality even in a social environment and should be alert to the possibility of inadvertent disclosure to an immediate family member like his brother-in-law.**

**(d) Timothy is not in breach of his duty to act with good faith. He maintains confidentiality when engaging with the press and public. His disclosure to his brother-in-law poses no risk as disclosures to immediate family members are not regarded as threats to compliance.**

QUESTION 2 (direct questions) [10 marks]

Commented [LJ6]: 10/10

Question 2.1 [maximum 3 marks]

**What are the most common elements associated with the existence of a fiduciary relationship generally?**

*[Fiduciary relationship is comprised of the following:*

- 1. One person undertaking to act on behalf of another and having discretion and power over the interests of the other person;*
- 2. Vulnerability of the person who entrusts his interests to the fiduciary<sup>1</sup>]*

Commented [LJ7]: 3/3

Question 2.2 [maximum 4 marks]

<sup>1</sup> Foundation Certificate in International Insolvency Law, Module 9 Guidance Text, Section 3.2, pages 3-5.



**Briefly explain the two-pronged nature of the duty to act with independence and impartiality.**

*[Independence in fact implies that the insolvency practitioner is actually not influenced by any external factors (personal and professional relationships, direct or indirect interests) which could compromise them. Independence in perception means that the insolvency practitioner does not provoke circumstances under which a reasonably informed third party may consider them compromised<sup>2</sup>]*

Commented [LJ8]: 4/4

Question 2.3 [maximum 3 marks]

**Explain the difference between professional and fidelity insurance and elaborate on why it is of particular importance for Insolvency Practitioners to obtain this type of insurance.**

*[Professional indemnity insurance provides coverage against the risk of the stakeholders suing the insolvency practitioner for acting without reasonable care, whilst the fidelity insurance protects the stakeholders against the risk of the insolvency practitioner acting dishonestly. The Insolvency practitioners have a lot of duties and there are a lot of situations which may pose threat to the insolvency practitioner's compliance with all the ethical requirements. Therefore, they should obtain insurance for the case when they are considered to breach their duties even if they did not mean to<sup>3</sup>]*

Commented [LJ9]: 3/3

QUESTION 3 (essay-type questions) [15 marks in total]

Commented [LJ10]: 12/15

Question 3.1 [maximum 6 marks]

**The ethical principle that requires insolvency practitioners to act with integrity also states that he should adhere to high moral and ethical standards. Explain what is meant by this and provide examples to illustrate the difference between these concepts.**

*[Moral standards are subjective standards of an insolvency practitioner, while ethical standards are specific rules which are regarded by the society as correct. In case when the moral concepts of the insolvency practitioner contradict the commonly accepted or legally binding ethical standards, the latter shall prevail. For instance, if the insolvency practitioner has empathy for the unprotected or low-rank creditors, such as employees, they may not breach the impartiality principles and treat major creditors unfairly<sup>4</sup>]*

Commented [LJ11]: Good example provided. The discussion is a little superficial though and the connection between morals and ethics was not addressed.  
3/6

Question 3.2 [maximum 9 marks]

<sup>2</sup> Foundation Certificate in International Insolvency Law, Module 9 Guidance Text, Section 5.3, page 18.

<sup>3</sup> Foundation Certificate in International Insolvency Law, Module 9 Guidance Text, Section 5.7.7, page 48.

<sup>4</sup> Foundation Certificate in International Insolvency Law, Module 9 Guidance Text, Section 5.2.2, page 15.

**Which elements of insolvency proceedings are especially prone to create or give rise to threats to independence and impartiality? Please elaborate with reference to primary and secondary sources of law.**

*[Among the elements of insolvency which are especially exposed to the risks related to independence and impartiality are:*

- 1. Pre-commencement / appointment involvement. Usually, before appointment an insolvency practitioner has consultations with the company and stakeholders. While such consultations expose the insolvency practitioner to the risk of being considered bias, consultations are considered appropriate as long as they are limited to certain aspects and do not involve any advice (See for example *Re Korda, Ten Network Ltd (Admn Apptd) (Recs and Mgrs Apptd) [2017] FCA 914 [Australia]*)*
- 2. Appointment. The insolvency practitioner is considered to be under influence of the person who appoints them. However, appointment is not a sufficient evidence of the insolvency practitioner being bias as long as they remember their duties and do not give any promises to the persons who appointed them.*
- 3. Subsequent appointment. In some jurisdictions, the sequential appointment of one insolvency practitioner in different bankruptcy procedures is considered a ground for a conflict of interest (See, for instance the *Insolvency Code of Ethics of the Institute of Chartered Accountants of England and Wales*) or prohibited (see, for instance *South African Companies Act of 2008*). Subsequent appointment is believed to give rise to the self-review and self-interest threats.*
- 4. Personal transactions with the company. Since the insolvency practitioner should act in the best interests of the company's creditors and the other stakeholders, a situation when they purchase the debtor's property or realised the estate to their own interest.<sup>5]</sup>*

Commented [LJ12]: 9/9

QUESTION 4 (fact-based application-type question) [15 marks in total]

***WeBuild Ltd is a private company registered in Eurafriclia. The company specialises in construction and property development and is well known in the area where it conducts its business. Mr B Inlaw, Dr I Dontcare and Mrs I Relevant are the directors of the company. The company has ten shareholders, with Mr B Inlaw and Dr I Dontcare also holding shares in the company.***

***The company traded profitably for the last 10 years but recently started to experience financial difficulties. One of the main reasons for the financial decline is the fact that several of the company's employees have instituted a class action claim against WeBuild for workplace-related injuries due to faulty machinery. This also resulted in bad publicity that led to a decline in contracts. The directors of the company were***

<sup>5 5</sup> Foundation Certificate in International Insolvency Law, Module 9 Guidance Text, Section 5.3, pages 18-28.

**made aware of the issues relating to the machinery, but chose not to take any action to remedy the situation. When the company's financial position started to decline the directors continued to trade as if nothing was amiss and even made several large payments to themselves by way of performance bonuses. When they received a letter of demand from the company's major secured creditor, ABC Bank, the directors decided to call a shareholders' meeting to discuss the company's options.**

**Present at this meeting were the shareholders, the directors and Mr Relation, a lawyer and licensed insolvency practitioner, to provide them with information and advice in relation to their options. Some of the shareholders recognised Mr Relation as Mr B Inlaw's brother-in-law and godfather to his daughter. During the meeting, Mr Relation suggests that the company enter into a voluntary administration procedure. Mr B Inlaw suggests that the company appoint Mr Relation as administrator. He accepts the appointment, ensuring that he discloses his relationship with Mr B Inlaw and says that he will declare that he believes that he will still be able to act with the required independence and impartiality. An undertaking that he complies with by subsequently issuing a written declaration of independence.**

**After the meeting adjourns, Mr B Inlaw requests the other directors and Mr Relation to stay behind for a brief "planning" meeting. During this subsequent meeting the directors inform Mr Relation that they are concerned about their personal liability for breach of duty. Moreover, they are worried that they might land in hot water due to their decision to continue trading when the company was clearly in dire financial straits. Mr Relation assures them that his focus will not be on them but on trying to rescue the company.**

**In the weeks that follow, Mr Relation conducts a superficial investigation into the affairs of the company and the circumstances leading to the financial difficulties of the company. He relies on detailed reports drafted by Mr B Inlaw regarding the company's business and drafts a strategic plan for recovery based on his investigation and the reports he received.**

**At a meeting of creditors to consider the plan, Mr Relation states that he has found no evidence of any wrongdoing or maladministration by the company's directors. Mrs Keeneye, a lawyer attending the meeting on behalf of ABC Bank, the major secured creditor, recognises Mr Relation from a television interview where Mr Relation expressed the opinion that banks should be more accommodating in restructuring proceedings and that he thinks that the interests of lower ranking creditors should sometimes outweigh "big money" (referring to financial institutions). She immediately feels uncomfortable with his appointment as administrator.**

**Several months later the administration fails due to a "lack of funding" to finance the rescue. The administration is subsequently converted to liquidation proceedings and Mr Relation is appointed as the liquidator.**

**Mr Relation's firm has been implementing a work-from-home arrangement for employees, and his secretary and associate have several sensitive documents pertaining to WeBuild Ltd in their possession and on their personal computers at home.**

#### **INSTRUCTIONS**

There are at least **THREE** major ethical issues in this factual scenario.

You are required to identify these ethical issues and explain in detail why they are in fact ethical issues. Your answer should include reference to the ethical principles and the commentary thereon. Where appropriate and suitable, you should also endeavour to elaborate on possible remedies or safeguarding mechanisms to minimise or remove the ethical threats.

You may also make use of case law and secondary sources to substantiate your answer.

*[First, Mr Relation acting as the company's administrator is the breach of his duty to exercise the powers of the office in an independent and impartial manner principle because he is related to the company's shareholder. There is a risk that Mr Relation might act in favour of Mr Inlaw and thus abuse the insolvency system which is inadmissible under Principle 33 of the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems and Principle 2 of the INSOL Principles. The most efficient prevention of the breach of the aforementioned principles is not to accept an appointment in case of any connections with the debtor's stakeholders'. However, Mr Relation has already admitted appointment and is in breach. In addition, Mr Relation risks to breach the principle of integrity (Principle 1 of the INSOL Principles) in the context of fair dealing in case he gives preferential treatment to Mr Inlaw.*

*Second, Mr Relation privately discussed the risks of directors' personal liability conceiving this fact from all shareholders except for Mr Inlaw. Knowing of the facts of misadministration, Mr Relation misinformed the shareholders that he has not found any evidence of the management wrongdoing. Such behaviour constitutes the breach of duty to act in the best interest of the beneficiary of the fiduciary duties.*

*There are various theories as to who is insolvency practitioner's (the "IP") beneficiary. For instance, according to the traditionalist theories, the IP shall take into account interests of such stakeholders as employees, suppliers and tax authorities. According to the contractarian and the "enlightened creditor value" theories creditors' interests shall be the IP's priority. In any case, debtor's unfair management cannot be Mr Relation's priority.*

*Furthermore, Mr Relation has breached the principle of integrity (Principle 1 of the INSOL Principles) since he discussed the potential issues of management's liability in*

*private and was not honest while preparing a report on the Company's financial status. Thus, the Company's major creditor assumes that Mr Relation is not impartial.*

*Another issue related to*

*Third, Mr Relation's staff keeps confidential documents on their private computers exposing them to the risk of becoming known to the family members. Should Mr Relation admit such behaviour of his staff, he will breach his duty to act with care, skill and diligence.*

*Fourth, Mr Relation's having voiced the "pro-low-ranking-creditors" approach in the past is a clear breach of the principle of integrity since an IP should never favour the interests of creditors, contributories and his appointers. ]*

**Commented [LJ13]:** Good overall discussion. However, there is limited engagement with the principles and their importance as well as the remedies/safeguards.

9/15

**\* End of Assessment \***